D.C. Mason Builders, Inc. *and* International Union of Bricklayers and Allied Craftsmen, Local Union No. 15, AFL–CIO. Case 6–CA–27284

August 23, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On March 14, 1996, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to modify the remedy and the recommended Order, as set out in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, D.C. Mason Builders, Inc., Keyser, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of employment for having engaged in concerted activity protected by Section 7 of the Act.

(b) Refusing to recall from layoff employees because they engaged in concerted activity protected by Section 7 of the Act.

(c) Refusing to abide by the terms of, and/or repudiating, a valid collective-bargaining agreement permissible under Section 8(f) of the Act.

(d) Failing and refusing to bargain with International Union of Bricklayers and Allied Craftsmen, Local Union No. 15, AFL–CIO, by failing and refusing to make contractually required monetary payments to the Union's benefit funds.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, offer Leroy Hunter Jr., immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Leroy Hunter Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary the amount of backpay due under the terms of this Order.

(e) Comply with all the terms and conditions of its collective-bargaining agreement between Construction Employers Association of North Central West Virginia and B.A.C. District Council of W.V. Bricklayers Cement Masons Local Union 15.

(f) Make all contributions to the benefit funds that have not been paid and that would have been paid in the absence of the Respondent's unlawful discontinuation of the payments, and make unit employees whole, in the manner set forth in the remedy section of this decision.

(g) Within 14 days after service by the Region, post at Keyser, West Virginia, copies of the attached notice

[1] The judge inferred from the record that the Respondent had not made contractual fringe benefit contributions since early 1995. We agree. Leroy Hunter Sr., the acting business manager of the Union, testified that he ordinarily received reports of fringe benefits paid into the funds and had not received any payments from the Respondent in 1995. The Respondent's owner's testimony indicates that he made fringe benefit contributions pursuant to the contract ''at least initially'' and that he operated under the contract ''until some point in 1995.'' Accordingly, we find that the Respondent has violated Sec. 8(a)(5) and (1) by failing to make contractually required contributions to the fringe benefit funds. We shall modify the judge's recommended remedy and Order to require the Respondent to make the funds whole by making all such delinquent contributions, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, the Respondent shall reimburse employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We will also modify the Order and notice to conform to the Board's standard, narrow injunctive language.

marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 1995.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with loss of employment should they engage in concerted activity protected by Section 7 of the Act.

WE WILL NOT refuse to recall from layoff employees because they have engaged in concerted activity protected by Section 7 of the Act.

WE WILL NOT refuse to comply with all the terms and conditions of our contract with International Union of Bricklayers and Allied Craftsmen, Local Union No. 15, AFL–CIO, by failing and refusing to make contractually required monetary payments to the Union's benefit funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contributions to the contractual benefit funds that have not been paid and that would have been paid in the absence of our discontinuance of the payments.

WE WILL, within 14 days from the date of the Board's Order, offer Leroy Hunter Jr. full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Leroy Hunter Jr. whole for any losses he may have suffered as a result of our failure to recall him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Leroy Hunter Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

D.C. MASON BUILDERS, INC.

Barton A. Meyers, Esq., for the General Counsel.
Leslie Cummings, pro se, of Keyser, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Fairmont, West Virginia, on December 6, 1995, on the General Counsel's complaint which alleged generally that the Respondent had breached and repudiated its contract with the Charging Party in violation of Section 8(a)(5) of the National Labor Relations Act (the Act). It is also alleged that the Respondent committed certain violations of Section 8(a)(1) and refused to recall an employee in violation of Section 8(a)(3).

The Respondent generally denied that it committed any violations of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

Having originally denied certain jurisdictional facts, at the hearing Leslie Cummings, the Respondent's president, stipulated that his Company is engaged as a masonry contractor

[1] The Respondent's president, who appeared at the hearing without counsel, was given the opportunity to submit a posthearing statement of his position. None has been received; however, he did state his position on the record, both by way of argument and under oath.

in the construction industry doing commercial and office construction with its principal place of business in Keyser, West Virginia. He further stipulated that during the 12-month period ending April 30, 1995, the Respondent provided services valued in excess of $50,000 to Hyman Construction and Breckenridge Construction Company, both of which are employers engaged in interstate commerce. Accordingly, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent further stipulated, and I find, that International Union of Bricklayers and Allied Craftsmen, Local Union No. 15, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In the summer of 1993 the Respondent had a project within the geographical jurisdiction of the Union. Learning this, Leroy Hunter Sr., the acting business manager of the Union (and director of the Bricklayers District Council of West Virginia), went to the project and talked to Cummings about signing a collective-bargaining agreement with the Union. Cummings said he would think about it. Hunter left two copies of the contract with Cummings, having signed one.

About 1 week later, on June 9, Hunter returned to the project and asked if Cummings was ready to sign. Cummings said that he did not have a copy of the contract, to which Hunter replied that he had two more. Cummings then signed the Acceptance of Agreement to be bound by the 1993–1996 agreement between the Construction Employers Association of North Central West Virginia and the Union. Though Hunter is unclear when he also signed this stipulation, he testified that it was within a short time since the Respondent began remitting payments to the appropriate fringe benefit trust funds in July. At the hearing Cummings stated that he paid the wages and fringes and otherwise complied with the contract.

Indeed, there were no difficulties between the Respondent and the Union for the next year. However, in November 1994, Hunter approached Cummings on the issue of Cummings having discharged two union stewards. Cummings stated that they were incompetent.

Hunter said that he would send him a steward about whose competence there could be no doubt—his son, Leroy Hunter Jr. Shortly thereafter, Hunter Jr. began working for the Respondent on a courthouse project. At that time, according to Hunter Jr., working on the job were Cummings, Joe Daken (who was apparently a minority co-owner but is no longer associated with the Respondent), Keith Abucevicz, Jimmy Krumpach, and Hunter Jr.

On December 2, Hunter Jr. filed a grievance because the job had been shut down on the starting day of deer season and because the employees were not being paid at the correct hourly rate. On January 11, 1995, Hunter Jr. filed another grievance concerning reporting time pay, and pay for Christmas Day. Both grievances were submitted by Hunter Sr. to Cummings, and receiving no response, to the joint committee appointed pursuant to the contract to resolve grievances.

In December, there was an inspection of the jobsite by a representative of the Occupational Safety and Heath Administration (OSHA). Hunter Jr., as job steward, was present for the walk through and following this Cummings said something about his displeasure and that he knew it was Hunter Jr. who had reported to OSHA.

In January, after a shutdown for 3 or 4 weeks, the Respondent started work again on this project; however, Hunter Jr. was not recalled.

B. *Analysis and Concluding Findings*

1. The contract violations

On July 21, 1995, a handwritten, undated letter from Cummings was received at the Board's Pittsburgh Regional Office. It states, ''We wish to remind all parties concerned, we have never had a Binding agreement with Local #15. If the NLRB chooses to use it [sic] time to pursue this matter so be it.''

As noted above, however, Cummings stated at the hearing that he had complied with the contract and paid the appropriate wage and fringe benefits. Although he disputes the merit of the grievances filed by the Union, and the allegations here, he does not really dispute the contract.

Further, it is clear, and I find, that he executed a stipulation to be bound by Union's collective-bargaining agreement with the employer association on June 9, 1993. He made payments to various fringe benefit funds, which is allowable only with a written, executed contract.[2]

Although Hunter Sr. did not execute the agreement contemporaneously with Cummings, I find such is of no great importance. Clearly the Union was meant to be bound, and was. In fact, Hunter Sr. signed one copy and left it with Cummings before June 9; and I credit his testimony that he signed the copy executed by Cummings sometime before the end of July. Throughout the next year, and even after the parties began having disputes, there was no question that Cummings and the Union were bound by the agreement, which is a typical construction industry contract, permitted under Section 8(f) of Act. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

Although not clear on the record, it does appear that since early 1995 the Respondent has not made appropriate fringe benefit contributions on behalf of its employees; and, the letter received in Board's Regional Office on July 21 was a clear repudiation of its obligations under the contract. An employer violates Section 8(a)(5) of the Act when it makes a midterm modification of a contract by failing to make appropriate fringe benefit payments. *Stevens & Associates Construction Co.*, 307 NLRB 1403 (1992). And, of course, outright repudiation of a contract is violative of Section 8(a)(5).

The General Counsel also contends that the Respondent violated Section 8(a)(5) by failing to participate in the grievance process initiated by Hunter Jr. Though an employer does not have to agree to grievances submitted by employ-

[2] Sec. 302 of the Act requires employers who contribute to such funds to have executed a written agreement containing certain specific provisions. Cummings admitted that he made fringe benefit payments. From this, and absent evidence to the contrary, I infer that a valid contract must have been on file with the trust funds.

ees, it does have an obligation to treat the provisions of a collective-bargaining agreement as a it would any other serious business matter. Thus, to ignore letters from the Union, and from the Joint Arbitration Committee, concerning the grievances demonstrates a failure to bargain in good faith.

Finally, it is alleged both as a grievance and as a breach of the agreement in violation of the Act that the Respondent failed to recall Hunter Jr. when work on the courthouse project resumed in January 1995. Hunter Sr. testified that when he went to the project he found Cummings working with the tools of the trade, along with Abucevicz, whom Cummings testified was then (and now) his foreman. There were no other employees of the Respondent then on the job, nor is there evidence of any others having been hired later.

Article XX states that the ''steward shall be the first bricklayer called back to work in the event of any work stoppage of any type.'' However, article XIX gives the employer the exclusive right to designate his foreman, who shall be a ''practical bricklayer.'' Section (c) of this article also states: ''When two (2) or more bricklayers are on the job, one shall be the foreman and shall be permitted to work with the tools of his trade.''

Article XXIV, section 4(a) seems to allow an owner to work with the tools of the trade, irrespective of the number of employees. And there is no dispute about Cummings being allowed to work as a bricklayer. However, the General Counsel argues that when an employer has work for only one bricklayer, the person hired must be the steward and that the employer can select a foreman only where there are at least two employees.

Although the Respondent had the contractual right to designate a foreman, where the only two bricklayers working were the owner and another, to designate the other as a foreman is clearly meaningless. I do not believe that Cummings took orders from Abucevicz. Rather, I conclude that Abucevicz was an employee, and would continue to be such until at least one other employee was hired. Thus, I further conclude that Cummings recalled Abucevicz in violation of the contractual obligation to recall the steward first.

It may be that the Respondent's manner of doing business changed such that Cummings now uses only himself and one employee. Such would suggest a single employee unit and would be inappropriate, thus allowing for the lawful repudiation of the contract. E.g., *D & B Masonry*, 275 NLRB 1403 (1985). Such a defense, however, would require proof that the single employee unit is a sable one. *McDaniel Electric*, 313 NLRB 126 (1993). No such finding can be made on the record here. Typically the Respondent has worked a crew of several bricklayers.

2. The threats

As noted, in early December Hunter Jr. presented several matters of grievance to Cummings. One of these involved Hunter's contention that he was entitled to show-up pay for a day in November, which he had been told he would receive but had not. Hunter testified that ''Cummings told me that if I didn't want to be on his job, to get the hell off; that he was tired of this shit that me and my dad were trying to pull on him.'' This was undenied by Cummings.

A statement to an employee along these lines is clearly a threat in violation of Section 8(a)(1) of the Act. *Intertherm, Inc*., 235 NLRB 693 fn. 6 (1978) (if ''he was not happy with the Company, he should look elsewhere for job'').

3. Refusal to rehire Hunter Jr.

In addition to concluding that Hunter Jr. had a contractual right to be recalled instead of Abucevicz, I also conclude that Cumming's decision not to do so was based in part on the union activity of Hunter Jr. It is clear that Cummings harbored animus toward Hunter Jr., as well as his father, and indeed the collective-bargaining process. Although Cummings denied ''any malice'' in his decision not to rehire Hunter Jr., the undenied evidence of his threat and his overall attitude toward the Union belie this.

I conclude that at least the General Counsel made out a prima facie case that Hunter Jr. was discriminated against, and the Respondent has failed to show that Hunter Jr. would not have been hired in any event. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982). Accordingly, I conclude that the Respondent violated Section 8(a)(3) when it refused to rehire Hunter Jr. in January 1995.

REMEDY

Having concluded that the Respondent has committed certain unfair labor practices, I recommend that it cease and desist therefrom and take certain appropriate action designed to effectuate the policies of the Act, including offering Leroy Hunter Jr. a job as a journeyman bricklayer and make him whole for any losses he may have suffered as a result of the discrimination against him, with interest. *F. W. Woolworth Co*., 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent make whole Hunter Jr. and any other employee for any losses they may have suffered as a result of the Respondent's failure to abide by the contract. *Ogle Protection Service*, 183 NLRB 682 (1970).

[Recommended Order omitted from publication.]